Supreme Court, U.S.
FILED
JUN 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1828

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

F. GEORGE ALBERTUS, *et al.*,
Appellants,

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,
Appellees.

On Appeal From The Supreme Court Of Missouri

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

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Reduced to its essence, the State's Motion to Dismiss or Affirm (hereinafter "Motion") would have this Court hold that if a classification based on the number of dwelling units is rational under any circumstances, it is rational in all circumstances. This is not and never has been a correct statement of the so called "rational basis" test.

As appellants have shown in their Jurisdictional Statement, the so called "rational basis" test consistently applied by this Court in analyzing equal protection challenges to classifications which do not involve "suspect" categories is in fact a two part analysis. Jurisdictional Statement, p. 8. The first step, which both the State and the Missouri Supreme Court have ignored, requires iden-

tification of what was or may have been the State's interest to be advanced by the classification and a determination of whether that interest is "legitimate." Only by identifying the legitimate state interest to be advanced by the classification can the court perform the second step and determine whether the classification is rationally related to the interest identified.

Even classifications based on factors such as age, sex and alienage may be upheld where the State can show a sufficient interest. That does not mean that such classifications are constitutional under all circumstances. That can only be determined by examining the particular state interest to be advanced by the classification. Thus, the State's laundry list of statutes establishing classifications based on the number of dwelling units is irrelevant. The fact that distinctions based on the number of dwelling units may be appropriate in other circumstances tells this Court nothing about whether it is appropriate in this instance.

Similarly, the State's cases from other state courts sustaining tax classifications based on the number of dwelling units are plainly distinguishable from this case. In none of those cased was there any constitutional provision defining and limiting the purpose to be served by the legislation. As Appellants have shown in their Jurisidictional Statement, the Missouri legislature's sole authority to enact § 137.016.1.(1) was derived from article X, § 4(b) of the Missouri Constitution, which itself establishes the only legitimate State interests to be advanced by legislation. Jurisdictional Statement, pp. 11-15. Thus, assuming *arguendo* that courts in other states have properly identified some other interests that might legitimately be advanced by classifications based on the number of dwelling units, such interests cannot be considered "legiti-

mate" in this case. The only state interests the Missouri legislature was free to pursue were those interests the people of Missouri endorsed by establishing separate residential, commercial and agricultural classifications in article X, § 4(b) of the state constitution.

Neither the State's Motion nor the opinion below make any attempt to articulate what interest the people of Missouri sought to advance by according more favorable tax treatment for residential and agricultural property. Rather, the State ignores article X, § 4(b) and seeks to justify § 137.016.1.(1) as rationally related to the State's interest in taxation generally. Motion, p. 7. This Court has never accepted such a broad, generalized interest as sufficient to support the required equal protection analysis. Moreover, if the State's general interest in taxation was deemed sufficient to support any classification increasing the tax burden on a given class, virtually any arbitrary classification would have to be upheld. The veterans in *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985), would have to be turned away because their exclusion from the class receiving favorable property tax treatment would necessarily produce more taxes for the State. The teaching of *Hooper* is to the contrary.

The State also asserts, without authority, that the subclasses of real property are based on the use to which the owner puts the property. Motion, p. 8. The Missouri Supreme Court did not adopt this construction of § 137.016 and the langauge of the statute belies such an interpretation. In § 137.016.1.(1), the legislature defined residential property in terms of the use or intended use of the property "for residential living by human occupants," not its use or intended use for residential living by the owner. In addition, property otherwise qualifying as residential property is excluded from the class based on

the composition of the structure, i.e., the number of dwelling units or presence of condominium units, not on the basis of whether it is rented or occupied by the owner. Moreover, in advancing its "owner occupancy" rationale, the State still has not articulated what legitimate state interest would be served or refuted Appellant's demonstration that § 137.016.1.(1) is incompatible with the State's previously assumed goal of encouraging home ownership. *See* Jurisdictional Statement, pp. 15-18.

The State has likewise failed to address or rebut Appellant's showing that the only likely purpose of article X, § 4(b) establishing separate classifications for residential, commercial and agricultural property was to minimize the tax burden on food and housing. *See* Jurisdictional Statement, pp. 11-15. Given this purpose, a classification based on the number of dwelling units is palpably arbitrary. Thus, contrary to the State's characterization of Appellants' position, Appellants are not quibbling over where the legislature chose to draw the line. Rather, Appellants maintain that any distinction based on the number of dwelling units cannot be considered rationally related to the State's legitimate interest of minimizing the tax burden on housing.

In sum, the State's Motion to Dismiss or Affirm suffers from precisely the same flaws as the opinion below. Neither the State nor the Missouri Supreme Court have acknowledged, let alone applied, the required equal protection analysis consistently applied by this Court. Especially in light of this Court's previous holdings requiring Appellants to seek vindication of their federal constitutional rights in state court, it now behooves this Court to exercise its supervisory appellate authority to ensure that state courts respect established precedents and accord such claims the same degree of scrutiny liti-

gants could expect in a federal forum. The question presented is substantial.

CONCLUSION

For these reasons, and for the reasons stated in the Jurisdictional Statement, this Court should note probable jurisdiction in this appeal and docket this case for argument. In the alternative, this Court should summarily reverse and remand this case to the Missouri Supreme Court with directions to determine: (1) the purpose of the classification of real property embodied in article X, § 4(b); (2) whether that purpose is legitimate; and (3) whether § 136.016.1.(1) is rationally related to that purpose.

Respectfully submitted,

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